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Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:
Rainer Hampp Verlag

Empfohlene Zitierung / Suggested Citation:

Kristensen, R. A. (2005). A place to stand upon: the development of a human rights compliance assessment for companies. *Zeitschrift für Wirtschafts- und Unternehmensethik*, 6(3), 380-389. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-347786>

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A place to stand upon

The development of a human rights compliance assessment for companies¹

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What Archimedes said of the mechanical powers, may be applied to Reason and Liberty: "Had we," said he, "a place to stand upon, we might raise the world".

Thomas Paine, The Rights of Man, 1792

This article discusses the main theoretical and conceptual challenges of defining the scope of corporate responsibilities with regard to human rights. The article argues that it is possible to modify the human rights obligations of governments to a business context. The article then examines the methodological as well as practical limitations of existing initiatives to rewrite international human rights law for companies. Finally, the article outlines the functionality and added value of the Human Rights Compliance Assessment (HRC/A) developed by the Danish Institute for Human Rights.

Keywords: human rights, corporate social responsibility, business ethics, human rights compliance assessment, UN Global Compact, UN Norms

1. Introduction

Few companies today question their responsibilities regarding the environment. Human rights, on the other hand, have traditionally been seen as a political issue with governments as the greatest violators of rights, but also as the entities with the responsibility to protect and promote the same rights. This perspective changed dramatically during the 1990s when the publicity surrounding the operations of multina-

¹ The author would like to express his considerable thanks to Dr. Margaret Jungk for inspiration and constructive comments on earlier drafts of this article.

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tionals in poor countries brought the subject of human rights and corporate conduct into the public eye. Shell and BP, to mention a few, were accused of complicity in state-sponsored human rights violations in Nigeria and Colombia. Similarly, companies in the footwear and clothing industry, such as Levis and Nike, were heavily criticised for the exploitative working conditions of their suppliers in Asia and Latin America. The recent focus on the impact of company operations on human rights has undoubtedly been prompted by the rapid globalisation of the world economy and the rise of the human rights movement during the last decade. As the power and reach of the multinationals has increased so has the vigilance of the human rights movement resulting in strong demands for companies to take responsibility for the protection and promotion of human rights. Activists have come to understand that business has the potential, not only to violate human rights, but also to use its enormous influence to improve the human rights situation throughout the world by influencing governments and changing societies. Companies, for their part, have responded to the activist pressure and growing public concern by engaging in discussions with their stakeholders and including references to human rights in their business principles. However, while there may be a dawning recognition of the importance of human rights, companies are still confused about what their responsibilities actually are, and how they should go about implementing a systematic policy in the area. This is perhaps not surprising given that few companies have human rights specialists on their payroll, but it nonetheless constitutes an important barrier to advancing human rights in a business context. The need for a clarification of the responsibilities, as well as the call for practical tools to facilitate implementation, has been the point of departure for the Human Rights & Business Project, established in 1999 by the Danish Institute of Human Rights in cooperation with the Confederation of Danish Industries (DI), the Industrialization Fund for Developing Countries (IFU) and the Danish Government. The result is the Human Rights Compliance Assessment (HRCA), a diagnostic tool designed to help companies detect potential human rights violations caused by the effect of their operations on employees, local residents and all other stakeholders. In essence, the HRCA provides a place to stand upon for companies who are uncertain about their responsibilities with regard to human rights. In addition, the tool helps companies translate abstract human rights principles into practical policies. The HRCA has been developed over a five-year period by a team of researchers from the Danish Institute for Human Rights, who drew on the input and expertise from many of the human rights specialists at the Institute and other research institutions from around the world. The researchers also worked in direct cooperation with DI, IFU and a number of affiliated companies to ensure that the resulting tool meets the needs of the business community. In the following, I will outline the normative basis of the tool as well as its practical applicability.

The remainder of this article is divided into five parts. The next section discusses the main theoretical challenges of defining the scope of corporate responsibilities with regard to human rights. Sections three and four examine concrete attempts to translate international human rights law into a business context and explain the added value of the HRCA compared to existing human rights guidelines for companies. The subsequent section looks more closely at the functionality of the HRCA and spells out how its human rights standards have been formatted in a way that makes them practical

and easy to implement in day-to-day business operations. The final section presents the lessons learned and considers the way forward.

2. The human rights responsibilities of companies

The involvement of business in human rights violations is hardly a new phenomenon, as demonstrated by the use of slave labour by private corporations during the Second World War. What is new and interesting about the contemporary debate is the idea that companies should be held directly responsible for human rights abuses. However, the extension of direct human rights responsibilities to companies challenges traditional human rights thinking and is replete with conceptual difficulties. Below, I will critically examine the two main concerns raised by companies and academic observers regarding business responsibilities for human rights.

The first concern is that international human rights law is directed to states, while companies have no legal obligation to uphold human rights. It is true that states are the primary duty-bearers with regard to human rights under international law. However, critics often forget that states have a duty to prevent non-state actors, including companies, from abusing human rights. More specifically, states are required to take measures to protect individuals from violations committed by others (Ewing 2004: 33). Unfortunately, many states are too corrupt or too weak to prevent non-state actors from violating human rights within their jurisdiction. Moreover, this failure is often difficult to correct, as there are no enforcement mechanisms at the international level. However, in these cases, businesses should still operate responsibly, even though there is no legal obligation to respect human rights (Jungk 2001: 5). This has been implied in a number of international declarations. For example, the revised version of the *OECD Guidelines for Multinational Enterprises (2000)* clearly states that “[Enterprises should] respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” Even in the absence of an international compliance regime, consumers and activists increasingly demand that corporations should be held accountable for their human rights violations. Amnesty International, for example, asks all companies to “take reasonable steps to ensure that their operations do not have a negative impact on the enjoyment of human rights by the communities in which they operate” (Amnesty 2002: 3). These are commercial and political realities that companies must respond to, whether they have a legal obligation or not.

The second concern companies have is that while they do acknowledge their responsibilities, international human rights law is still written for states, and is therefore difficult to apply in a business context. Companies cannot undertake all the responsibilities incumbent upon states, and they cannot fulfil the responsibilities in the same way as states. Certainly, taking instruments designed to bind states and using them to bind firms is not a negligible step. International conventions and treaties are normally expressed in the classical human rights form where states are called upon to limit their own powers in relation to individual freedoms. Such obligations are clearly beyond the scope of any individual firm. Similarly, individual firms do not have the resources, power, or legitimacy to institute national policies in areas such as poverty reduction or racial discrimination (Ewing 2004: 36; Jungk 2001: 6). The rejoinder, however, is that

this is not an insurmountable challenge; responsibilities can be modified to a business context. The normative basis for this translation should be that responsibilities are defined in proportion to the nature and activities of business.

The responsibilities of business can be identified using traditional distinctions within international human rights law. In particular, the distinction between positive and negative duties is a useful starting point when rewriting human rights directly to companies. In contrast to states, companies should primarily have their obligations defined in negative terms – that is, to refrain from violating the rights of others through their activities (Jungk 2001: 6). This principle is justified on the grounds that positive duties would conflict with the fiduciary obligations of businesses towards their shareholders. In addition, positive duties often involve sensitive political balancing of decisions in the public interest, something which normally falls within the discretion of elected state officials (OHCHR 2005: 13). That being said, Margaret Jungk suggests that companies should incur more extensive obligations in at least four areas (Jungk 2001: 9). First, businesses have positive duties towards their own employees. A clear example of this duty is the obligation to protect employees from harassment and abuse by fellow workers. Second, companies have a positive obligation to make sure that their products are not used in violation of human rights. This duty includes, among other things, an obligation to prevent unintentional misuse of products by informing users of safety precautions. Third, a company has positive responsibilities towards communities living near its operations, including indigenous peoples and other vulnerable groups residing on company land. This means, for example, that companies should consult with local inhabitants and take measures to mitigate and address any negative effects that its operations may have on their rights. Finally, companies incur positive duties when they *de facto* replace the government. This follows logically from the principle that states have the primary responsibility for promoting and securing human rights within their jurisdictions. The more companies act as governments by engaging in public functions, the more they are burdened with the positive human rights obligations of governments. This is particularly the case, if a weak and unstable government allows a company to effectively take control over an area and become the only authority. Under such circumstances, the company may be required to provide essential services, such as security, housing, food, and healthcare to its host community.

Another helpful means to clarify the scope of business responsibilities for human rights is the distinction between direct and indirect responsibility (Jungk 2001: 10). Direct responsibility arises when a company actively initiates or perpetrates human rights violations. In such cases, the company has a clear obligation to do whatever is necessary to stop the violations. Indirect responsibility arises when a company is *complicit* in human rights abuse committed by others. This means that a company is participating in or facilitating human rights violations, but does not directly commit the violations itself (Wynhoven/ Wendland 2004: 19). In such cases, the company still has an obligation to use its influence to stop or mitigate the violations, but the degree of responsibility should be proportionate to the proximity of the company to the violations (Jungk 2001: 10). This suggests that there may be different degrees or types of complicity. Andrew Clapham argues that complicity may take three different forms, namely direct, beneficial, or silent complicity (Clapham/ Jerbi 2001). *Direct complicity*

refers to a situation where a company knowingly encourages or provides assistance to human rights violations committed by others. An often cited example of this type of complicity is companies paying private security forces to repress peaceful demonstrators. A company is *beneficially complicit* if it benefits from human rights abuse. Examples include companies which tolerate human rights abuse committed by its suppliers or partners. Finally, *silent complicity* arises when a company fails to act or speak out against systematic and continuous human rights violations taking place in its area of operation. The classic example is companies located in countries with repressive governments. Although the companies have no connection to any violations, Clapham argues that they have an obligation to raise their concerns with the appropriate authorities. While Clapham's categorisation advances our understanding of the concept of complicity, it is not without problems. First, it is questionable whether all his categories actually give rise to business responsibilities. Clapham seems to argue that the three types of complicity give rise to different *degrees* of responsibility. The obligation to take action is therefore much stronger when the company is directly complicit in human rights abuse than in cases of beneficial and silent complicity. Even so, Margaret Jungk objects to the concept of silent complicity which she believes places too many burdens on companies. If a company has no connection to the violations, it is difficult to see why it should have any responsibility to take action (Jungk 2003: 10). Second, Clapham argues that direct complicity requires "knowledge of foreseeable harmful effects" (Clapham/ Jerbi 2001: 339). While it makes sense to suggest that a company can only be considered complicit in *foreseeable* violations, the additional qualification that the company must have acted *knowingly* seems misguided. If complicity requires knowledge, companies would be encouraged to turn a blind eye to potential violations. That being said, the challenge of preventing indirect violations in practice should not be underestimated. What we may realistically expect from companies is that they practice due diligence in their dealings with governments, suppliers and customers – that is, to have safety measures in place to detect and prevent complicity in human rights abuse.

While the exact boundaries of business responsibility for human rights continue to be debated, there seems to be an emerging consensus on the normative foundation of these responsibilities, as outlined above. The challenge remains, however, to translate these abstract principles into practical and concrete human rights standards for business.

3. Existing human rights standards for business

The principles of the UN Global Compact and the recent publication by the UN Sub-Commission on Human Rights of its Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) are examples of international initiatives that seek to clarify corporate responsibility by rewriting international human rights law directly for companies. In the following, I will critically examine these initiatives and explain the added value of the Human Rights Compliance Assessment (HRCA).

The UN Global Compact contains ten principles relating to human rights, labour rights and the environment. The human rights principles are derived from the Univer-

sal Declaration of Human Rights (UDHR) and state that “Businesses should support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses”. Although the Global Compact has sought to clarify the meaning of these commitments and provide ideas for bringing human rights into company policies, the principles remain vague and do not represent a detailed translation of international human rights law into a business context. In contrast, the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights provide more guidance to businesses on their responsibilities for human rights. The Norms identify business responsibilities with regard to non-discrimination, security of persons, labour rights, consumer protection and environmental protection. While being more comprehensive, clear and detailed than the Global Compact, critics have argued that the UN Norms remain vague and difficult for companies to work with (OHCHR 2005: 10). Another problem is that the Norms do not adequately distinguish between a rights-based approach and an issue-based approach and thereby fail to systematically go through all the principal human rights and clarify what aspects are relevant to the activities of business. This is problematic since the responsibility to protect and support human rights in principle applies to all internationally recognised rights. In sum, while the above mentioned initiatives represent an important first step in defining the human rights responsibilities of companies, the various guidelines remain declaratory and difficult for companies to use when assessing their activities in relation to human rights. Companies need more detailed standards supported by practical guidelines for implementation in order to make human rights operational in a business context. This is the gap that the Human Rights Compliance Assessment (HRCA) is trying to close.

4. The Human Rights Compliance Assessment

The HRCA is a diagnostic tool designed to help companies detect and prevent human rights violations. The tool runs a searchable database containing over 300 questions and 1.000 corresponding human rights indicators which businesses should consider when assessing the human rights impact of their operations. The tool is developed from the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and over 80 other major human rights treaties, including the ILO Conventions. As such, the HRCA constitutes the most exhaustive and detailed translation to date of international human rights law into a business context. The tool is very detailed in order to prevent the criticism levelled against the other human rights initiatives for business, namely that the vagueness of their standards makes them difficult for companies to work with. Unlike the other initiatives to clarify business responsibilities for human rights, the HRCA also applies a systematic rights-based approach. The tool uses the UDHR as an overall framework and identifies business responsibilities in relation to each of the articles contained in the Declaration. While most companies tend to focus on those human rights issues which have become the subject of public criticism, such as child labour, the problem with an issue-based approach is that it is very difficult to foresee all relevant issues before they explode in the media (Thorsen 2002: 3). A rights-based approach, on the other hand, is more proac-

tive in the sense that it enables companies to identify and address relevant aspects of *all* human rights from the beginning. In that way, companies will be prepared when a new human rights issue is brought into the public eye.

To ensure that the translation of international human rights law for business has the support and wide acceptance of both companies and human rights groups, the HRCA was taken through a large-scale consultation process in 2003-2004 funded by the European Commission. A number of individuals from both large corporations as well as small and medium-sized enterprises gave comments on the HRCA. Moreover, a wide range of industry sectors were represented, including the extractive sector, the pharmaceutical and chemical industry, food and beverages, telecommunications, and manufacturing and apparel. Likewise, human rights organisations, corporate social responsibility organisations, universities and research institutions of different interests and fields of expertise were given the opportunity to review and comment on the HRCA. In total, representatives from more than 40 companies and 40 human rights groups from 14 European countries participated in the consultation process. The process involved three phases, which are each described in more detail below (see also Jungk 2003). In the *expert reviews*, a number of specialists in various fields of human rights protection were recruited to review and evaluate the HRCA standards. The experts were charged with the task of ensuring that vulnerable groups received due coverage in the HRCA and that no relevant subjects or issues were overlooked. In the *dialogue reviews*, companies and human rights groups from different parts of Europe were paired off in teams. Each review team consisted of one commercial and one human rights representative that reviewed the same rights to ensure that the resulting standards represent practical and economic concerns as well as community interests. Each team subsequently met together with a representative from the Danish Institute for Human Rights to review the standards associated with one or two different rights and to debate suggestions for modification. If agreement was reached, the standard was deemed to pass and remain in the HRCA. Any areas of disagreement were sent to a *specialist committee* composed of five representatives from human rights groups and five from the business community. The committee reviewed disputed standards and indicators identified during the consultation process, and either rejected them entirely, or reformulated them to make them acceptable for inclusion in the HRCA. This broad and wide-ranging consultation process resulted in a multifaceted and comprehensive review of the HRCA, helping to ensure that the standards reflect a wider consensus within the business and human rights communities.

5. A practical tool for implantation

While a review of international human rights law is an important first step in helping companies to act on their responsibilities, it is clearly not enough. Companies need guidance on the actual implementation of the standards in order to make them operational in a business context. The HRCA therefore goes beyond a simple legal translation by providing a practical framework which allows companies to see how human rights can be assessed and incorporated into their daily operations. Initial consultations with Danish business organisations and a small group of companies representing various sectors, sizes, and areas of operation demonstrated two major business needs,

namely *flexible* and *easy-to-use* tools. Taking these demands into consideration, the HRCA is based on familiar company methods so that business people can rapidly integrate these to help them maintain good human rights practices at every stage of company operations. More specifically, the HRCA is modelled on the lines of the familiar environmental impact assessments (EIA). As with the EIA, the HRCA comprises practical checklists with concrete questions and indicators that help companies assess the human rights impact of their operations. Another parallel with the EIA is that the HRCA is focused on prevention rather than detection. Because the humanitarian and reputational costs of corporate human rights violations are so great, it is essential to apply a proactive approach. As a manager from a Danish company in the food industry said:

“While you can usually remove chemical pollutants from your products before they reach the consumers, this option is not available in the case of child labour. When you realise it is there, the damage has already been done” (Jungk 2003: 3).

As mentioned above, the HRCA comprises a number of practical and concrete checklists. Currently, three different types of checklists are available, namely a check by right, a check by department, and the quick check. The *check by right* contains what the term implies, namely checklists for each of the rights contained in the Universal Declaration of Human Rights. In the *check by department*, we have analysed company responsibilities in relation to the typical departmental structure of most companies. Six major areas are thus covered in the HRCA: employment practices, operational practices, land management, products and marketing practices, research and development, and public utilities and services. The purpose of the departmental checks is to help companies identify those functions within the firm that are at risk of becoming linked to human rights abuse. Another aim is to strengthen the flexibility of the tool by allowing company managers to select those human rights standards most relevant to their daily activities. This feature does not imply an issue-based approach. While the point of reference is specific departments, responsibilities are still identified for all human rights. Finally, the *quick check* is a compilation of the most essential questions contained in the entire HRCA database. The check was developed in cooperation with a group of 15 development finance institutes to provide companies and investment funds with a condensed assessment covering key human rights issues.

Each of the checklists is composed of a number of questions with corresponding human rights indicators. The human rights standards are framed as practical *questions* to help managers determine whether or not the company is in compliance. The *indicators* are guidelines designed to help companies determine whether or not they comply with the main questions. There are three types of indicators in the tool: policy, procedure and performance. The policy indicators seek to determine whether the company has policies or guidelines in place to address the human rights issue of concern. The procedural indicators inquire whether the company has appropriate and sufficient procedures in place to effectuate the policies, while the performance indicators request verification of company performance.

To strengthen its efficiency, the HRCA is available as an interactive computer programme that allows companies to generate checklists and answer questions online. When a questionnaire is complete, the computer programme generates a report identi-

fying areas of compliance and non-compliance in the company's operations. Numeric scores are included in the report to help the company to monitor its performance and set benchmarks for the future.

6. The way forward

The HRCA quick check was released in December 2004 and has subsequently attracted more than 300 registered users from 39 different countries. The other checks have been available since September 2005. While it is too early to assess the strengths and weaknesses of the HRCA, the initial feedback from companies and human rights organisations suggests that the tool is fully capable of detecting potential human rights violations by businesses. Moreover, company managers with no prior experience in dealing with human rights issues find the tool straightforward and easy to apply in their daily operations. These positive results are also confirmed by field tests run in relation to companies from Shell International during the process of developing the tool. More feedback will allow us to further refine the HRCA in the coming years and thereby ensure that it continues to serve as an effective and reliable tool to help companies prevent human rights violations. At present, research has been scheduled to develop sector-specific checks to facilitate a quicker and more targeted application of the tool.

Business responsibility for human rights is a new and rapidly developing field which presents many conceptual and practical challenges. While many companies have accepted responsibility for human rights issues, this growing commitment will remain declarations of intent with no real impact on corporate performance, unless realistic and practical tools in the area are developed. Companies need guidance if they are to use their great power to protect and support human rights, but with a place to stand upon, they might raise the world.

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